

University of Groningen

Competence remains competence? Reopening decisions that violate Community Law

Jans, J.H.; Marseille, A.T.

Published in:
Review of European Administrative Law

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2007

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):

Jans, J. H., & Marseille, A. T. (2007). Competence remains competence? Reopening decisions that violate Community Law. *Review of European Administrative Law*, 75-86.

Copyright

Other than for strictly personal use, it is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), unless the work is under an open content license (like Creative Commons).

The publication may also be distributed here under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license. More information can be found on the University of Groningen website: <https://www.rug.nl/library/open-access/self-archiving-pure/taverne-amendment>.

Take-down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Downloaded from the University of Groningen/UMCG research database (Pure): <http://www.rug.nl/research/portal>. For technical reasons the number of authors shown on this cover page is limited to 10 maximum.

Competence Remains Competence? Reopening Decisions that Violate Community Law

Prof. Dr. Jan H. Jans & Dr. Bert (A).T. Marseille

Department of Administrative Law and Public Administration,
Faculty of Law, University of Groningen

Abstract

This paper discusses the question what should administrative bodies do in cases where they have adopted decisions that turn out to be contrary to Community law, but these decisions have become final because the parties concerned have not made use of the possibilities of judicial review available to them.

I Introduction

What should administrative bodies do in cases where they have adopted decisions that turn out to be contrary to Community law, but these decisions have become final because the parties concerned have not made use of the possibilities of judicial review available to them? The reader of this journal is, of course, familiar with the judgment of the Court of Justice in the *Kühne & Heitz* case.¹ In *Kühne & Heitz* (para. 24), the Court decided that in certain circumstances, administrative bodies are under an obligation to reopen an administrative decision which has become final, when this decision is contrary to Community law. This is the case when:

- 1) national law confers on the administrative body competence to reopen the decision in question, which has become final;
- 2) that decision became final only as a result of a judgment of a national court against whose decisions there is no judicial remedy;
- 3) that judgment was based on an interpretation of Community law which, in the light of a subsequent judgment of the Court, was incorrect and which was adopted without a question being referred to the Court for a preliminary ruling in accordance with the conditions provided for in the third paragraph of Article 234 EC;
- 4) the person concerned complained to the administrative body immediately after becoming aware of that judgment of the Court.

One of the questions that remained unanswered in *Kühne & Heitz* – because the referring judge in *Kühne & Heitz* did not raise it – was whether an administrative body is also obliged to reopen an earlier incorrect decision when the parties concerned *did not* make use of legal remedies against the decision. Elsewhere, one of the present authors stated, following *Kühne*

¹ Case C-453/00 *Kühne & Heitz* [2004] ECR I-837.

Heitz, that this possibility should not be ruled out completely.² It is, for instance, conceivable that a party concerned could not ‘reasonably’ be expected to bring an action against every unfavourable decision, for instance when it is completely clear that an action against the decision would be unsuccessful.³ Although the Court in *Kühne & Heitz* referred to the specific circumstances of the case, the question remained whether these four criteria should be understood to be cumulative, limitative or merely tentative.

2 Arcor and i-21

In its judgment of 19 September 2006, joined cases C-392/04 and C-422/04, *i-21 Germany GmbH and Arcor AG & Co. KG* (hereinafter *Arcor*),⁴ the Court has given further clarity on the scope of the obligation to reopen a decision. This judgment is therefore, from the point of view of legal analysis, the follow-up to *Kühne & Heitz*. The facts of the case were as follows.

Arcor and i-21 are two telecommunications undertakings that, under the German *Telekommunikationsgesetz* and the *Telekommunikations-Lizenzgebührenverordnung* and by order of the competent German administrative body, had been charged high fees (€ 5,420,000 for i-21 and approximately € 67,000 for Arcor) for telecommunications licences granted to them. They paid these fees without objection and did not appeal against them within the set time-limit of one month. In a different case, meanwhile, the *Bundesverwaltungsgericht* had held that the *Telekommunikations-Lizenzgebührenverordnung* was not compatible with higher-ranking legal rules: the *Telekommunikationsgesetz* and the German Constitution. Subsequently, Arcor and i-21 sought repayment of the fees which they had paid. Their claims were not granted. They both, subsequently, brought individual proceedings before the *Verwaltungsgericht*, which dismissed the appeals on the ground that the fee notices had become final and that in the present situation there were no grounds for challenging the administrative body’s refusal to withdraw those assessments. Under German law, administrative bodies, pursuant to § 48 of the *Verwaltungsverfahrensgesetz*, have discretion to withdraw

² J.H. Jans & K.J. de Graaf, ‘Bevoegdheid = verplichting? Enkele opmerkingen over de uitspraak van het Hof van Justitie in de zaak Kühne & Heitz’, *NTER* 2004, p. 98-102.

³ It can be concluded from the judgment of the Court, cf. Joined Cases C-397/98 and C-410/98 *Metallgesellschaft* [2001] ECR I-1727, that this idea is not unknown in the European legal order. See on this topic in more detail J.H. Jans, R. de Lange, S. Prechal & R.J.G.M. Widdershoven *Europeanisation of Public Law*, Groningen 2007, p. 356. The basic idea – interested parties cannot be required to take unreasonable action – is also at the basis of the recent judgment of the Court in the *Placanica* case, Joined Cases C-338/04, C-359/04 & C-360/04, judgment of 6 March 2007, (para. 67).

⁴ [2006] ECR I-8559.

an unlawful administrative act which has become final. This discretion may, however, be reduced to zero if upholding the act in question would be 'outright intolerable' (in German: '*schlechthin unerträglich*') in respect of public policy, good faith, fairness, equal treatment or manifest unlawfulness.⁵

The central question that was put to the Court of Justice by the *Bundesverwaltungsgericht* was whether Article 10 EC should be interpreted to mean that a fee assessment that determines certain fees (as described in the first question put to the ECJ) and which has not been contested, although such a possibility is afforded under national law, must be set aside where that is permissible, but not mandatory, under national law.

It is now at least clear from *Arcor* that the requirement to make use of legal remedies is extremely strict. In para. 53, the Court notes that the crucial difference between *Arcor* and *Kühne & Heitz* is precisely the fact that "i-21 and Arcor did not avail themselves of their right to appeal against the fee assessments issued to them" while "Kühne & Heitz NV had exhausted all legal remedies available to it". The Court continues in para. 54: "Accordingly, contrary to the argument advanced by i-21, the judgment in *Kühne & Heitz* is *not relevant* for the purposes of determining whether, in a situation such as that in the main proceedings, an administrative body is under an obligation to review decisions which have become final" (emphasis added). This is a very elegant way of saying that the Court still supports the judgment in *Kühne & Heitz*, which was heavily criticized in academic writing, but does not wish to enlarge the scope of it beyond the specific circumstances of *Kühne & Heitz* itself.

Thus, even if there is competence under § 48 *Verwaltungsverfahrensgesetz*, there is no general obligation for an administrative body to reopen an earlier unlawful decision, when this decision, upon expiry of the time-limits for legal remedies, has acquired "formal" legal force, i.e. has become final. The rationale behind this is to be found in the principle of legal certainty. According to the Court, para. 51, compliance with the principle of legal certainty prevents administrative acts that produce legal effects from being called into question indefinitely.⁶

Incidentally, another case that can be mentioned in this context is the *Kapferer* case.⁷ It is apparent from that case that when the decision has become final, after exhaustion of all legal remedies (*res judicata*) the aforementioned obligation does not exist either (*a fortiori*, it may be said). It thus seems necessary to redefine *Kühne & Heitz*. Everything seems to indicate that the significance of *Kühne & Heitz* is limited, and that this judgment does not affect the rule that a violation of norms of Community law is in itself insufficient to consider an administrative body obliged to reopen

⁵ Cf. Hartmut Maurer, *Allgemeines Verwaltungsrecht*, München 2006, p. 324-327.

⁶ Cf. Case C-310/97 P *Commission v. AssiDomän Kraft Products a.o.* [1999] ECR I-5363, para. 61.

⁷ Case C-234/04 *Kapferer* [2006] ECR I-2585.

unlawful decisions. We have already heard of the ‘rise and fall of *Emmott*’; now, because of *Arcor*, it is the turn of *Kühne & Heitz*!

3 Competence Remains Competence?

So, let us return to *Kühne & Heitz*. That judgment was characterised by ambiguity of reasoning regarding the basis for the Court’s decision. In *Kühne & Heitz* the Court only referred to Article 10 EC in general terms, and it did not become clear why the Court believed that, in this case, the Dutch administrative body’s competence under national law (Article 4:6 *Algemene wet bestuursrecht* (*Awb*); General Administrative Law Act) to reopen a previous decision, was transformed into an obligation to do so. In this context we may also mention the inaugural lecture by Jans, in which the Court was accused of not having sufficiently clarified why it believes that, starting from the well-known principle of procedural autonomy, in some cases national administrative procedural law can ‘simply’ be applied (competence remains competence) and in some cases it cannot (competence becomes obligation).⁸ In this case too, parties disagreed on the question of whether the German administrative law in question should be judged according to the ‘strict’ approach based on the principle of primacy, or that the Court should apply the more ‘flexible’ and ‘Member State-friendly’ approach of the *Rewe/Comet* principle (paras. 44-48):

‘44 i-21 maintains that to uphold such an administrative act is contrary to the principle of the primacy of Community law and the need to maintain its effectiveness. It submits that even if the Court acknowledges the importance of the principle of legal certainty, the latter does not in every case outweigh the principle of lawfulness. i-21 points out that, in the judgment in *Kühne & Heitz*, cited above, the Court considered that an administrative act which had acquired binding force following a judgment which could not be the subject of an appeal could be annulled, in certain circumstances, if it were contrary to Community law. i-21 takes the view that this possibility becomes even greater in the case of an administrative act which was not the subject of a judicial decision and which became final merely upon expiry of the time-limits allowed for appealing.

45 *Arcor* considers, for its part, that the judgment in *Kühne & Heitz* is not relevant inasmuch as it concerns an indirect conflict between a rule of national procedure and a rule of substantive Community law, the first rule preventing application of the second. According to *Arcor*, the case in the main

⁸ J.H. Jans, *Doorgeschoten? Enkele opmerkingen over de gevolgen van de Europeanisering van het bestuursrecht voor de grondslagen van de bestuursrechtspraak* (inaugural lecture, University of Groningen), Groningen 2005, in particular p. 24-27.

proceedings should be regarded as a direct conflict between two rules of substantive law. Article 11(1) of Directive 97/13, read in the light of Article 10 EC, requires fees levied in breach of Article 11 to be repaid, while the national legislation prohibits such reimbursement. Arcor takes the view that Community law should, in such a case, prevail over conflicting national law.

46 The Commission maintains, on the other hand, that the judgment in *Kühne & Heitz* is a suitable starting point and points out that, in principle, an administrative act which has not been challenged within the time-limits laid down should not be withdrawn. The Commission goes on to state that, in the present case, it must be ascertained whether upholding the unlawful fee assessments should nevertheless be considered to be 'outright intolerable' in the light of Article 11(1) of Directive 97/13 and that that question should be examined in the light of the principles of equivalence and effectiveness.

47 In relation to the principle of equivalence, the Commission submits that, according to German law, an administrative act which is manifestly unlawful under national law cannot be upheld. If that examination were also carried out in the light of Community law, the result would, in the Commission's view, be that the fee assessments at issue in the main proceedings and the legislation on which they are based would have to be considered to be manifestly unlawful in the light of Article 11(1) of Directive 97/13.

48 The Commission arrives at the same conclusion as regards the principle of effectiveness. It takes the view that to uphold the fee assessments would make it practically impossible to exercise the rights derived from Article 11(1) of the directive, by allowing an overcompensation which leads to restricting competition over a period of 30 years.'

The 'competence=obligation-case law' is a kind of black box, and this case does not make it any more transparent. Such a lack of transparency means that it is always difficult to predict what the next decision of the Court will be in cases where the principle of legal certainty and the effective and uniform application of European law come into conflict because of national procedural law.⁹

Another notable aspect is the difference in approach within *Arcor* itself between, on the one hand, the question of whether an obligation to reopen exists under European law and, on the other hand, the question of how the national courts should act in conformity with the principle of equivalence if an obligation to reopen exists under national law. Under German administrative law an obligation exists to withdraw an administrative act that is unlawful under national law, even if it has become final, when upholding the act would be 'outright intolerable'. On this issue, the Court ruled as follows:

⁹ Cf. for instance this case with Case C-119/05 *Lucchini SpA*, judgment of 18 July 2007, nyr. See in particular the opinion of Advocate General Geelhoed of 14 September 2006.

'64 It is clear from the information provided by the national court that, for the purposes of construing the term outright intolerable, the national court examined whether upholding the fee assessments at issue in the main proceedings ran counter to the national legal principles of equal treatment, fairness, public policy or good faith, and whether the incompatibility of the fee assessments with rules of higher-ranking law was manifest.

65 As regards the principle of equal treatment, the Bundesverwaltungsgericht considers that there is no breach of that principle in so far as undertakings such as i-21 and Arcor, whose fee assessments have been upheld, had not exercised their right to challenge those assessments. They are therefore not in a situation comparable to that of undertakings which, having exercised that right, succeeded in having the fee assessments which had been addressed to them withdrawn.

66 Such an application of the principle of equal treatment provided for in the legislation at issue in the main proceedings does not differ according to whether the dispute relates to a situation arising under national law or to a situation arising under Community law and therefore does not appear to breach the principle of equivalence.

67 Moreover, it was not alleged that the principles of public policy, good faith or fairness were applied differently according to the nature of the dispute.

68 However, the question has been raised as to whether the concept of manifest unlawfulness was applied in an equivalent manner. According to the Commission, the national court examined whether the fee assessments were based on legislation that was manifestly unlawful with regard to rules of higher-ranking law, namely the TKG and German constitutional law, but did not or did not correctly conduct that examination with regard to Community law. The Commission maintains that the legislation is manifestly unlawful with regard to the provisions of Article 11(1) of Directive 97/13 and that the principle of equivalence has therefore not been complied with.

69 Where, pursuant to rules of national law, the administration is required to withdraw an administrative decision which has become final if that decision is manifestly incompatible with domestic law, that same obligation must exist if the decision is manifestly incompatible with Community law.

70 In order to assess the degree of clarity of Article 11(1) of Directive 97/13 and to determine whether or not the incompatibility of the national law with that article is manifest, the objectives of that directive, which is among the measures adopted for the complete liberalisation of telecommunications services and infrastructures and is intended to encourage the entry of new operators onto the market, must be taken into account (see, to that effect, *Albacom and Infostrada*, cited above in paragraph 35). In that regard, the imposition of a very high fee to cover an estimation of the general costs over a period of 30 years is such as to seriously impair competition, as the national court points out in its references for a preliminary ruling, and constitutes a relevant factor in that assessment.

71 It is for the national court, in the light of the foregoing, to ascertain whether legislation which is clearly incompatible with Community law, such as that on which the fee assessments at issue in the main proceedings is based, constitutes manifest unlawfulness within the meaning of the national law concerned.’

As to this question, the Court appears, in a formal sense at least, to merely give the national court guidelines on how to act. According to para. 71 “it is for the *national court* [...] to ascertain whether legislation which is clearly incompatible with Community law [...] constitutes manifest unlawfulness *within the meaning of the national law concerned*”.¹⁰ However, it seems as though it could be inferred, particularly from para. 70, that the Court was under the assumption that the national court would come to the conclusion that the high fee is manifestly incompatible with Community law and that the administrative body will thus have to withdraw the decision. This, however, was not how the story ended. In a judgment of 17 January 2007 the *Bundesverwaltungsgericht* decided that the national legislation in question did not constitute manifest unlawfulness within the meaning of the relevant national law (§ 48 *Verwaltungsverfahrensgesetz*).¹¹ According to the *Bundesverwaltungsgericht* the concept of manifest unlawfulness implies that there was no reasonable doubt – at the time the contested decision was taken – about its infringement of the law.¹² Applying this to the case at hand it came to the conclusion that it could not be maintained that at the time of the contested decision there was no reasonable doubt that the German telecom legislation involving high fees was incompatible with Article 11 of Directive 97/13. The incompatibility with EC law was only revealed by the judgment of the Court in *Arcor* itself, and in earlier case law pertinent to the directive.¹³ According to the *Bundesverwaltungsgericht*, the complexity of the reasoning of the Court of Justice proved that the incompatibility was not at all evident. Finally, the *Bundesverwaltungsgericht*, relied on a judgment of the *Oberverwaltungsgericht Münster*¹⁴ – which had decided that the German legislation was compatible – in reaching its decision that the national legislation in question did not constitute manifest unlawfulness within the meaning of § 48 *Verwaltungsverfahrensgesetz*.

¹⁰ Emphasis added.

¹¹ BVerwG 6 C 33,06

¹² Para. 14 of the judgment: “Eine offensichtliche Rechtswidrigkeit in diesem Sinne ist anzunehmen, wenn an dem Verstoß der streitigen Maßnahme gegen formelles oder materielles Recht vernünftigerweise kein Zweifel besteht und sich deshalb die Rechtswidrigkeit aufdrängt. [...] Maßgeblicher Zeitpunkt für die Beurteilung, ob sich der Verwaltungsakt als offensichtlich rechtswidrig erweist, ist in der Regel – und so auch hier – der Zeitpunkt des Erlasses des Verwaltungsakts.”

¹³ Joined Cases C-292/01 and C-293/02 *Albacom & Infostrada* [2003] ECR I-9449.

¹⁴ Judgment of 27 October 1999 (13 B 843/99), *MMR* 2000, 115.

We agree with Taborowski that the *Bundesverwaltungsgericht* seems to stay within the margin of discretion granted by the ECJ in para. 71 of the judgment.¹⁵ If a decision of an administrative body is ‘clearly incompatible with Community law’ it does not imply automatically also ‘manifest unlawfulness within the meaning of § 48 *Verwaltungsverfahrensgesetz*’. And we do agree, with both the ECJ and the *Bundesverwaltungsgericht*, that is for the latter to decide on whether this incompatibility qualifies under § 48 *Verwaltungsverfahrensgesetz* or not. On the other hand, it cannot be assumed that the *Bundesverwaltungsgericht* is completely free. The two tests have to be distinguished from each other and are not the same; but on the other hand they are interrelated and not dissimilar either. It is the authors’ view that there is no evidence in the judgment that the Court of Justice is of the opinion that the degree of clarity of the infringement has varied over the years. Arguably, the Court is of the opinion that the incompatibility of the German legislation is as clear now as it was at the moment the legislation came into force. Therefore we are not completely sure that the *Bundesverwaltungsgericht* has understood the ECJ’s judgment in *Arcor* in the way it was intended by the Court. Even though the Court of Justice stated that the national court itself must decide whether the refusal of the German authorities to reopen incorrect decisions on grounds of European law is “outright intolerable”, and thus unlawful, the strong guidance given by the Court could have been, or even should have been, interpreted as calling on the *Bundesverwaltungsrecht* to decide that the German authorities must in this case make use of their competence to reopen the decision, in a fashion that was not meant to be ignored.¹⁶

4 The Consequences of *Arcor* for Dutch Administrative Law

What does this decision mean for Dutch administrative law? In the Netherlands, administrative bodies, just as in Germany, have the competence to reopen decisions that have become final. Unlike in Germany, this competence is not laid down in elaborate general legislation. We only have one general provision in the *Algemene wet bestuursrecht* (General Administrative Law Act, *Awb*; Article 4:6), a number of provisions in special laws and

¹⁵ Cf. the case note of M. Taborowski in 44/5 *CMLRev.* forthcoming.

¹⁶ In the same sentence, the *Anmerkung* by Matthias Ruffert in *JZ* 8/2007, p. 407 et seq.: “Angesichts der deutlichen Hinweise des EuGH wäre es erstaunlich, wenn das BVerwG in de abschließenden Entscheidung keine Rücknahmepflicht statuierte, und aus Sicht des Gemeinschaftsrechts wie des deutschen Verwaltungsrechts ist dies auch das einzig vertretbare Ergebnis.”

the general principle that administrative bodies – be it with a number of limitations – can amend or withdraw, decisions that they have made.¹⁷

Article 4:6 paragraph 1 *Awb* reads: “If a new application is made after an administrative decision has been made rejecting all or part of an application, the applicant shall state any new facts that have emerged or circumstances that have altered.”¹⁸ The second paragraph subsequently states: “If no new facts or altered circumstances are stated, the administrative authority may, without applying Article 4:5, reject the application by referring to its administrative decision rejecting the previous application.”¹⁹ In other words, Article 4:6 *Awb* requires that if a concerned party wants the administrative body to reopen an earlier unfavourable decision, that party must indicate newly discovered facts or a change of circumstances. In the absence thereof, it is sufficient for the administrative body, when denying the request, to refer to the earlier decision. That consequently means that when there *are* new facts or a change of circumstances, it is not sufficient for the administrative body to simply refer to the earlier negative decision.

According to the Court of Justice, for an obligation of administrative bodies to reopen or even amend decisions that were adopted in violation of rules of European law to exist, it is not sufficient that they have the competence to do so. What is essential, according to *Arcor*, is the question under which circumstances this competence becomes an obligation. Because if that is the case, this obligation should apply equally to decisions taken in violation of national law and decisions taken in violation of EC law.

Under German law, the competence becomes an obligation if it would be “outright intolerable” that the decision which has become final remains unchanged. When are administrative bodies obliged to make use of their competence to reopen under Dutch law? Dutch administrative law is unique in that there are several different appeal courts, which have different views on the matter. The Dutch *Afdeling bestuursrechtspraak van de Raad van State* (hereinafter: *Raad van State*)²⁰ applies as a rigid principle that *competence* of the administrative body can never lead to an *obligation* to grant a request to

¹⁷ Cf. Dutch *Raad van State* 12 December 2001, AB 2002, 323, note by Marseille. See furthermore K.J. de Graaf & A.T. Marseille, ‘Review of Final Decisions in the Netherlands, Germany and Europe’, in: K.J. de Graaf, J.H. Jans, A.T. Marseille, & J. de Ridder, *Quality of Decision-Making in Public Law; Studies in Administrative Decision-Making in the Netherlands*, Groningen 2007 (forthcoming).

¹⁸ Unofficial translation. The authentic text in Dutch: “Indien na een geheel of gedeeltelijk afwijzende beschikking een nieuwe aanvraag wordt gedaan, is de aanvrager gehouden nieuw gebleken feiten of veranderde omstandigheden te vermelden.”

¹⁹ In Dutch: “Wanneer geen nieuw gebleken feiten of veranderde omstandigheden worden vermeld, kan het bestuursorgaan zonder toepassing te geven aan artikel 4:5 de aanvraag afwijzen onder verwijzing naar zijn eerdere afwijzende beschikking.”

²⁰ The *Afdeling bestuursrechtspraak van de Raad van State* (Council of State, Administrative Jurisdiction Division) is one of the highest administrative court in the Netherlands. It hears

reopen a decision.²¹ For this body, the most important aspect is that when a party appeals against the rejection of a request to reopen a decision, it should not be able to get the court to rule on this appeal as if it were an appeal against the original decision. This would, after all, allow that party to create a new right of appeal for himself, which would seriously impair the legal certainty for the administrative body and for third parties, who should be able to rely on the finality and irrevocability of the decision. The *Raad van State* makes practically no exceptions to this principle in its case law.²² Other 'highest' administrative Courts in the Netherlands are, however, a bit more flexible. The *Centrale Raad van Beroep*²³ and the *College van Beroep voor het bedrijfsleven*²⁴ are of the opinion that, under certain circumstances, an obligation for an administrative body to reopen a decision that has become final may exist. This is the case when it must be concluded that the administrative body could not 'reasonably' decide not to make use of that competence, or, by not making use of it, has acted in violation of written or unwritten law or a general principle of law.²⁵

Seen from this perspective, not every Dutch administrative body is equally obliged to reopen decisions that have become final and are incompatible with European law. Administrative bodies whose decisions are ultimately subject to the judgment of the *Raad van State* as highest administrative court would not so easily be under such an obligation as administrative bodies whose decisions are liable to appeal before the *Centrale Raad van Beroep* or the *College van Beroep voor het bedrijfsleven* as highest courts of appeal.

The differing views of the various Dutch appeal courts regarding the obligation for administrative bodies to reopen decisions that have become final, leads to two questions. The most obvious question – which was already raised by Widdershoven in his annotation of a judgment of the *Raad van*

appeals lodged by members of the public against decisions or orders given by municipal, provincial or central government.

²¹ Cf. e.g. *Raad van State* 4 April 2003, AB 2003, 315, note by Vermeulen. As has been noted, the situation is different if a request is based on new facts or altered circumstances. However, a judicial decision does not constitute a *novum* as required under Art. 4:6 Awb; Cf. e.g. *Raad van State* 3 September 1999, AB 2000, 362.

²² Cf. e.g. *Raad van State* 5 March 2002, AB 2002, 169, note by Sewandono.

²³ The *Centrale Raad van Beroep*, or in English, the Central Appeals Tribunal is a board of appeal which is mainly active in legal areas pertaining to social security and the civil service. In these areas it is the highest judicial authority.

²⁴ The *College van Beroep voor het bedrijfsleven*, or in English, the Trade and Industry Appeals Tribunal is a special administrative court which rules on disputes in the area of social-economic administrative law. In addition this appeals tribunal also rules on appeals for specific laws, such as the Competition Act and the Telecommunications Act.

²⁵ Cf. e.g. *Centrale Raad van Beroep* 27 January 2006, RSV 2006/124 and *College van Beroep voor het bedrijfsleven* 22 June 2004, JB 2004/300.

State of 12 July 2006²⁶ – is whether it is a problem under European law that different Dutch appeal courts give a different interpretation of provisions of national procedural law that are relevant to the application of European law. Widdershoven says this is not the case, although he makes a number of reservations. Our own view on the obligation of administrative authorities to reopen decisions that have become final, is that, on the one hand, the fact that in the Netherlands different highest administrative courts can hold different views on this is defensible. After all, if the Court accepts that the degree to which substantive European law takes effect can differ from one Member State to another (because of the fact that procedural rules of the various Member States leave varying degrees of discretion to the administrative authorities in handling its implementation), it does not seem obvious that the Court would have a problem with the fact that such a difference exists *within* Member States. On the other hand, a difference in approach between the various highest national administrative courts does indicate *inconsistency*. And this could also mean that the ‘strict’ interpretation of Article 4:6 *Awb* might be harder to justify. After all, how can one highest administrative court justify a ‘stricter’ interpretation, when the other highest administrative court takes a more flexible approach?

Then there is the second question. Is it problematic from a European law perspective that national courts allow administrative bodies complete freedom regarding the exercise of their competence to reopen decisions, as the *Raad van State* does? The judgment does not give a conclusive answer to this question, but it seems unlikely that the Court would not find a problem here. We refer in this respect to our comments *supra* on the handling of the *Arcor* judgment by the *Bundesverwaltungsgericht*.

5 Conclusion

The Court of Justice in a friendly but firm manner directed the German *Bundesverwaltungsgericht* towards a judgment requiring the administrative body to reopen the decision regarding the fees charged to i-21 and *Arcor*. In our opinion, the Court reached a delicate balance between the need to ensure effective application of Community law on the one hand, and the need to respect national procedural autonomy on the other. We are not quite sure whether the *Bundesverwaltungsgericht*, in its application of the *Arcor* judgment, appreciated the undertone in the *Arcor* judgment in a fully correct manner. True, it was acknowledged explicitly in *Arcor* that it is a matter for the national court to decide whether or not to require administrative bodies to reopen decisions that have become final. But it cannot be assumed that this competence is an unlimited one. In our opinion the conclusion of the *Bundesverwaltungsgericht* that national legislation which

²⁶ AB 2006, 338

is ‘clearly incompatible with Community law’ did not imply ‘manifest unlawfulness’ within the meaning of § 48 *Verwaltungsverfahrensgesetz* is not completely convincing and does not explain adequately why the strong guidance given by the Court calling on the *Bundesverwaltungsrecht* to decide that the German authorities must in this case make use of their competence to reopen the decision, was ignored after all.

Our final conclusion on the *Arcor* saga is that if § 48 *Verwaltungsverfahrensgesetz* indeed does not require administrative bodies to reopen decisions in situations like that at issue, this triggers the question to what extent § 48 *Verwaltungsverfahrensgesetz* itself is still compatible with Community law, Article 10 EC in particular. It must be assumed that Community law will require national courts to retain at least some room for review of the exercise of competence to reopen decisions by the national authorities. It must be noted that national legislation that makes withdrawal of decisions that have become final (virtually) impossible, is not in compliance with the principle of loyal cooperation, laid down in Article 10 EC.²⁷ Other Member States should draw their own conclusions, and act accordingly: if the cap fits, wear it!

²⁷ Cf. Klaus Ferdinand Gärditz, ‘Die Bestandskraft gemeinschaftsrechtswidriger Verwaltungsakte zwischen Kasuistik und Systembildung’, *NWVBl.* 12/2006, p. 441-449 (p. 446), Matthias Ruffert, ‘Anmerkung’ on Case C-234/04, *Kapferer* in *JZ* 18/2006, p. 905-906.